STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL HESTER, Plaintiff-Appellee, v DEPARTMENT OF CORRECTIONS, Defendant-Appellant.	UNPUBLISHED June 5, 2014 No. 314572 Wayne Circuit Court LC No. 11-010663-CD
MICHAEL HESTER, Plaintiff-Appellee, v DEPARTMENT OF CORRECTIONS, Defendant-Appellant.	No. 315553 Wayne Circuit Court LC No. 11-010663-CD

Before: RIORDAN, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

In docket no. 314572, defendant, the Department of Corrections, appeals as of right the jury verdict in favor of plaintiff, Michael Hester, in this action under the Michigan Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq.* In docket no. 315553, defendant appeals as of right the trial court's award of attorney fees and costs to plaintiff. These appeals were consolidated for our review. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

Plaintiff, a building trades supervisor at Ryan Correctional Facility, initiated the instant litigation alleging that his supervisor, Sergio Paglia, unlawfully discriminated against him on the basis of race. Plaintiff claimed that this conduct violated the Michigan Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq.*, under a disparate treatment and hostile work

environment theory. While defendant sought summary disposition, the trial court denied the motion, and the case proceeded to trial.

Plaintiff produced the testimony of four coworkers, two white males and two black males, who testified that Paglia singled plaintiff out on the basis of race. The witnesses verified that plaintiff received more and less desirable work than his white counterpart. They also testified that white workers would often refuse to do work, so Paglia would reassign it to plaintiff, who was unable to refuse. Paglia also wrote plaintiff up for failing to install a circulating pump, even though it was outside of plaintiff's job classification and plaintiff feared it was dangerous. Paglia also was overheard on one occasion confronting the black workers and yelling that he had been oppressed longer than "all of you brothers have."

Another incident occurred when plaintiff and other white workers were drinking coffee. When Paglia entered the room, he ordered plaintiff to work but permitted the white workers to remain. Plaintiff's coworkers testified that this type of incident occurred daily, and one white employee testified that he became "embarrassed" for plaintiff. Plaintiff also detailed that he dreaded coming to work, would fight the urge to throw up, and became very sad.

Paglia, however, denied that he singled plaintiff out on the basis of race. Plaintiff's white counterpart, Michael Pryslak, claimed that while there was a mean-spirited atmosphere directed at plaintiff, it was not based on race. Defendant also elicited testimony that Paglia treated Pryslak more favorably than white workers, that Paglia was generally disliked, and that plaintiff's coworkers did not have knowledge of the actual work order list.

Plaintiff and his coworkers testified that they repeatedly complained about the racially charged environment to Paglia's supervisor, Leroy Farnsworth, and to administrative officer Mark Rudd. Nothing was done and nothing changed. Farnsworth testified that he received only one complaint on the basis of race, and Rudd denied receiving any verbal complaints on the basis of race. Defendant eventually filed an internal written complaint against Paglia. While plaintiff ultimately received notice that his allegations were substantiated, because Paglia had retired by that time, no further action was taken.

The jury found in favor of plaintiff under both a disparate treatment and hostile work environment claim. The jury calculated damages in the amount of $452,000. Plaintiff subsequently requested attorney fees and costs and after a hearing wherein defendant disputed plaintiff's requests, the trial court awarded $9,706.03 in costs and $127,882 in attorney fees. Defendant now appeals on several grounds.

II. HOSTILE WORK ENVIRONMENT

A. STANDARD OF REVIEW

In docket no. 314572, defendant contends that the trial court erred in denying its motion for a directed verdict.[1] As this Court recently summarized:

> We review de novo the trial court's grant or denial of a directed verdict. When evaluating a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor. Conflicts in the evidence must be decided in the nonmoving party's favor to decide whether a question of fact existed. A directed verdict is appropriately granted only when no factual questions exist on which reasonable jurors could differ. [*Aroma Wines & Equip, Inc v Columbia Distribution Servs, Inc*, 303 Mich App 441, 446; 844 NW2d 727 (2013) (quotation marks and citations omitted).]

B. ANALYSIS

The elements necessary to establish a prima facie case of discrimination based on hostile work environment are as follows: (1) the employee belonged to a protected group; (2) the employee was subject to communication or conduct on the basis of his protected status; (3) the employee was subject to unwelcome conduct or communication involving his protected status; (4) the unwelcome conduct was intended to or did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) *respondeat superior*. *Quinto v Cross & Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996); see also *Downey v Charlevoix Co Bd of Rd Comm'rs*, 227 Mich App 621, 629; 576 NW2d 712 (1998). While the CRA does not include a provision defining racial harassment, this Court has held "that harassment based on any one of the enumerated classifications is an actionable offense." *Malan v Gen Dynamics Land Sys, Inc*, 212 Mich App 585, 587; 538 NW2d 76 (1995).

The second element of this test requires a finding that but for the protected status, the plaintiff would not have been the object of harassment. *Haynie v State*, 468 Mich 302, 309; 664 NW2d 129 (2003). In regard to the fourth element, "whether an environment is 'hostile' or 'abusive' can be determined . . . by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v Forklift Sys, Inc*, 510 US 17, 23; 114 S Ct 367, 371; 126 L Ed 2d 295 (1993). In regard to the fifth element, "[r]espondeat superior liability exists when an employer has adequate notice of the harassment and fails to take appropriate corrective action." *Elezovic v Bennett*, 274 Mich App 1, 7; 731 NW2d 452 (2007).

In order to prevail on a hostile work environment claim, the plaintiff must present evidence that a reasonable person would find that, under the totality of circumstances, the comments and conduct directed at him were sufficiently severe or pervasive to create a hostile

[1] Defendant refers only to the directed verdict motion in its standard of review and preservation sections for this issue.

work environment. *Quinto*, 451 Mich at 369. Stated differently, "a hostile work environment claim is actionable when the work environment is so tainted that, in the totality of the circumstances, a reasonable person in the plaintiff's position would have perceived the conduct at issue as substantially interfering with employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Radtke v Everett*, 442 Mich 368, 372; 501 NW2d 155 (1993).

In the instant case, defendant contends that plaintiff failed to establish that any harassment would not have occurred but for plaintiff's race. Defendant contends that plaintiff merely presented witnesses who offered their subjective opinion that plaintiff was receiving more work because of his race, which is not objective. As defendant notes, "whether a hostile work environment exists should be determined by an objective reasonableness standard, not by the subjective perceptions of a plaintiff." *Radtke*, 442 Mich at 388. Yet, plaintiff is not relying merely on his subjective perceptions, but instead presents testimony from his four coworkers who testified that plaintiff received more and less desirable work than his white counterpart, and would receive work that white employees rebuffed. The singling out of plaintiff from his white counterparts supports a finding that this conduct would not have occurred but for plaintiff's race. While defendant attempts to undermine this testimony by labeling it subjective, that is simply an attack on the witnesses' credibility, which is within the jury's purview. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003).

Defendant also argues that plaintiff failed to identify any inherently racial communications or conduct. Defendant posits that the only arguable racial comment was the "brothers" comment, which was relatively innocuous, and did not rise to the level of a hostile work environment. However, plaintiff and his coworkers—Johnny Tolbert, Jeffrey Smith, Kevin Kotzian (Kevin), Ralph Kotzian (Ralph)—testified that Paglia singled plaintiff out because he was black. Tolbert explained that Paglia treated plaintiff consistently differently than his white coworkers, was harsher, talked down to plaintiff, ordered him inside, and would "rid[e]" him. There was further evidence that Paglia referred to plaintiff and his black coworkers using generalized racial terms such as "brothers" or "blacks" and "democrats."[2] We also find fault with defendant's attempt to analyze each individual incident in isolation, and then conclude that each incident lacked a racial character. In a directed verdict motion, we review all of the evidence plaintiff presents. When viewed as a whole, the evidence of Paglia's repeated singling out of plaintiff from his white counterpart and racial comments are enough to raise a question of fact regarding the racial nature of Paglia's conduct.

In light of the above, we find there was at least a question of fact that the unwanted conduct and communications would not have occurred but for plaintiff's race and involved the protected characteristic. *Quinto*, 451 Mich at 368-369; *Haynie*, 468 Mich at 308-309. We are

[2] While defendant highlights the "brothers" comment and contends that it was a stray remark, defendant is importing the "stray remarks" analysis from a sex discrimination case, *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 135-136, 136 n 8; 666 NW2d 186 (2003), not a hostile work environment case.

cognizant that our review is in the light most favorable to plaintiff, we draw all reasonable inferences in his favor, and all conflicts in the evidence are resolved in his favor. *Aroma Wines & Equip, Inc*, 303 Mich App at 446. Thus, defendant's argument fails.

Lastly, defendant argues that plaintiff failed to establish a substantial interference with employment or the creation of a hostile work environment. Relying solely on federal caselaw, defendant posits that the alleged conduct did not rise to the level of a "hostile" work environment, and at most reflected that Paglia was not the most pleasant boss. The cases defendant cites are not persuasive. The majority of the cases refer to a supervisor being verbally abusive to an employee, which various federal courts have found to be insufficient to support a claim. In this case, the thrust of plaintiff's claims is not that Paglia was verbally abusive, but that Paglia's racial discrimination impacted all aspects of the work environment and most particularly in terms of workload.

According to the witnesses plaintiff produced at trial, Paglia's racial animus was most obvious when he assigned plaintiff significantly more and less desirable work than his white counterparts. Paglia also allowed white workers to sit idly in the shop and to refuse work, while at the same time he ordered plaintiff out of the shop. The evidence established that such conduct was pervasive, and lasted over a number of years. As Smith testified, there was a "high intensity" of racial harassment directed at plaintiff on a daily basis. Kevin testified that as a white employee, he was increasingly embarrassed about the work environment, and that there was significant tension and division along racial lines. Plaintiff testified that it got to the point where he "could hardly stand to come to work[.]" His stomach "would start to turn," he would feel the urge to "throw up," he was "frustrated," "burning up," and "hated" going to work.

In light of the foregoing, and when viewed in the light most favorable to plaintiff, we find that there were sufficient factual questions about whether plaintiff was subjected to unwelcome communication or conduct on the basis of his race and whether it resulted in an intimidating, hostile, or offensive work environment. *Quinto*, 451 Mich at 368-369.[3] Although defendant contends that if either the disparate treatment or hostile work environment claim fails then a new trial is required, the jury made separate findings in this case regarding each theory.[4] Moreover, defendant fails to identify what evidence, if any, would have been excluded in either factual finding by the jury. This Court has repeatedly stated that a party may not rely on mere assertions and leave it to this Court to unravel and support its arguments. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

III. ATTORNEY FEES

[3] Defendant raises no arguments or challenge to the *respondeat superior* element.

[4] Furthermore, if a plaintiff "establish[s] direct proof that the discriminatory animus was causally related to the decisionmaker's action . . . the case ordinarily must be submitted to the factfinder for a determination whether the plaintiff's claims are true." *Graham v Ford*, 237 Mich App 670, 677; 604 NW2d 713 (1999).

A. STANDARD OF REVIEW

In docket no. 315553, defendant challenges the trial court's award of attorney fees and costs.

The decision to grant attorney fees is a question of law that we review *de novo*. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). We review for an abuse of discretion the trial court's award of attorney fees and costs. *Id.* "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.*

B. REASONABLE ATTORNEY FEE

"[T]he burden of proving the reasonableness of the requested fees rests with the party requesting them." *Smith*, 481 Mich at 528-529.[5] Trial courts should consider the totality of the circumstances when determining a reasonable attorney fee. *Id.* at 529. As the lead opinion in *Smith* elucidates, when determining a reasonable attorney fee, the trial court should adhere to the following rubric: (1) determine "the fee customarily charged in the locality for similar legal services," based on "reliable surveys or other credible evidence of the legal market[;]" (2) multiple that "by the reasonable number of hours expended in the case[;]" and (3) then consider the remaining factors in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982)[6] and the Michigan Rules of Professional Conduct 1.5(a)[7], in order "to determine whether an up or down adjustment is appropriate." *Id.* at 530-531.

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[5] Plaintiff moved for costs and attorney fees under both MCR 2.403(o) (case evaluation) and MCL 37.2802 (CRA). Neither party disputes that attorney fees were warranted, or that the framework set forth in *Smith* applies in this case. Only the reasonableness of the amount is at issue.

[6] The *Wood* factors are: "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." *Wood*, 413 Mich at 588.

[7] The MRPC 1.5(a) factors are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

The lead opinion in *Smith* further explained that "[t]he reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work. The market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question." *Id.* at 531 (quotation marks and citation omitted). The moving party bears the burden of producing satisfactory evidence, in addition to the attorney's affidavit, that the requested fee is consistent with the prevailing fees charged "in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Id.* (quotation marks and citation omitted). Trial courts should not rely on mere "anecdotal statements" but should consider "relevant to variations in locality, experience, and practice area." *Id.* at 531-532.

When deciding the time and labor involved, "the court must determine the reasonable number of hours expended by each attorney." *Id.* at 532. The trial court must review detailed billing records, and "[i]f a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence." *Id.* When a court multiplies the reasonable hourly rate by the reasonable hours billed, the resulting figure is known as the baseline figure. *Id.* at 533. The court then "should consider the other factors and determine whether they support an increase or decrease in the base number." *Id.*

1. REASONABLE HOURLY RATE

Defendant first argues that the trial court erred in finding that "the fee customarily charged in the locality for similar legal services" was $400 for attorney James Rasor and $300 for attorney Jonathan Marko. Because of the paucity of trial court findings, we agree with defendant that remanding for further factual findings is warranted.

The trial court ultimately held that a rate of $400 for Rasor and $300 for Marko was supported "by the most recent . . . bar survey" and "[w]hether it's for employment litigation or whether it's for the personal injury attorneys, the 300 and 400 respectively are within the acceptable realm for either." Yet, in the 2010 State Bar survey that plaintiff attached, a $400 rate for employment litigation, which the trial court referenced, is listed at the 95th percentile. The court made no findings why that percentile would be justified. The survey also includes a civil rights category, which the trial court showed no awareness of, with a median hourly rate of $230 and a 95th percentile of $460.

Even if the trial court selected a figure within the range of different practice areas, that does not illuminate *why* the trial court found that figure reasonable in this case. The court did not decide the employment category or percentile it was relying on, did not reference similar cases within the county, nor did it identify and analyze Rasor's or Marko's skill level and experience[8] or the nature of the law firm. See , e.g., *Fraser Trebilcock Davis & Dunlap, PC v*

[8] The trial court failed to identify or rely on the fact that Rasor was supposedly a managing partner, and Rasor's resume was not attached to plaintiff's motion for costs.

Boyce Trust 2350, 304 Mich App 174, 190-191; __NW2d__ (2014) (the court properly discussed and compared the attorney's experience, firm size, field of practice, and primary locations in order to determine what percentile was warranted); see also *Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204, 233-234; 823 NW2d 843 (2012) ("The market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question.") (Quotation marks and citation omitted).

While plaintiff contends that a review of the State Bar survey supports the trial court's decision, without knowing what the trial court was relying on or the reasons and similarities it found persuasive, we are unable to agree. On the record before this Court, we are left without adequate findings to review.

2. REASONABLE HOURS

Defendant next argues that the trial court abdicated its role in examining the billing records and merely adopted plaintiff's assertion of attorney hours worked. However, the trial court discussed defendant's objections, and merely disagreed with its contention. The court found that the amount billed for the December 4th to December 7th period was reasonable. The court also lowered Rasor's hours for December 8th as excessive, as Rasor billed a total of 25.3 hours for a 24 hour day. The court further found that Rasor and Marko's "duplicative" billing for the same time period was not unusual or excessive, as having two attorneys working at trial was reasonable. See *JC Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 429; 552 NW2d 466 (1996).

Thus, contrary to defendant's assertions, the trial court addressed its concerns and examined the billing statements submitted. Moreover, a review of the trial court's findings and the billings statements exposes no error warranting reversal. The billing statements were sufficiently detailed, and included the nature of the activity billed with a short description. Further, defendant's arguments on appeal essentially amount to a generalized attack on the billing, which does little to demonstrate trial court error.

3. REMAINING FACTORS

However, defendant is correct that the trial court erred in failing to address the remaining *Smith* prong relating to the *Wood* factors and those derived from MRPC 1.5(a).

In *Wood*, 413 Mich at 588, the Court stated "there is no precise formula for computing the reasonableness of an attorney's fee" and that while a court should consider applicable factors, "it is not limited to those factors in making its determination." We recently explained that the lead opinion in *Smith* "clarified the statement in *Wood* that the trial court was not required to make detailed findings regarding each specific factor. The lead opinion [in *Smith*] stated 'that in order to aid appellate review, the court should briefly address on the record its view of each of the factors.' " *Fraser Trebilcock Davis & Dunlap, PC*, 304 Mich App at 221, quoting *Smith*, 481 Mich at 529 n 14. *Smith* also instructed that a trial "court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors." 481 Mich at 531.

Here, the trial court failed to mention or analyze any of the applicable factors. Thus, on remand, the trial court should briefly discuss its findings on each of the *Wood* and MRPC factors, and state whether an upward or downward departure is warranted as a result.

IV. COSTS

A. STANDARD OF REVIEW

Lastly, defendant challenges the trial court's ruling on various recoverable costs. "We review for an abuse of discretion a trial court's award of attorney fees and costs." *Van Elslander*, 297 Mich App at 211 (quotation marks and citation omitted). "[W]hether a particular expense is taxable as a cost is a question of law, which we review de novo." *Guerrero v Smith*, 280 Mich App 647, 670; 761 NW2d 723 (2008).

B. ANALYSIS

As plaintiff recognizes, pursuant to the CRA, MCL 37.2802, a trial court has the authority to "award all or a portion of the costs of litigation. . . ." However, "[t]he power to tax certain expenses is statutory, and the prevailing party cannot recover such expenses absent statutory authority." *Elia v Hazen*, 242 Mich App 374, 379; 619 NW2d 1 (2000); see also *Van Elslander*, 297 Mich App at 216. Contrary to plaintiff's assertion on appeal, the mere fact that a statue authorizes the recovery of costs does not mean that each and every claimed expense is recoverable. See *Van Elslander*, 297 Mich App at 216 (quotation marks and citation omitted) (it is not true that "every expense incurred by the prevailing party in connection with the proceeding may be recovered against the opposing party."); see also *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 622; 550 NW2d 580, 585 (1996) (quotation marks and citation omitted) (" 'costs' or 'taxable costs' are strictly defined by statute, and the term is not as broad.").

Plaintiff highlights no statutory authority for the recovery of PowerPoint fees. See, e.g., *JC Bldg Corp II*, 217 Mich App at 429 (because there is "no statutory authority allowing the costs for . . . exhibit enlargement," such costs are not recoverable). Nor does plaintiff highlight specific statutory authority for the recovery of copying fees. See *id.* (because there is "no statutory authority allowing the costs for certified copies[,]" such costs are not recoverable); see also *Guerrero*, 280 Mich App at 674 ("no statute or court rule authorizes the taxation of general copying expense[.]"). Further, plaintiff conceded at the hearing that he did not file the transcripts, and pursuant to MCL 600.2549, any fee associated with unfiled transcripts is not recoverable. *Guerrero*, 280 Mich App at 674.

We agree with defendant that the record is insufficient to support a finding that expert fees were recoverable. While "[c]onferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position are not regarded as properly compensable as expert witness fees . . . [e]xperts are properly compensated for court time and the time required to prepare for their testimony" as well as their "traveling expenses[.]" *Van Elslander*, 297 Mich App at 218 (quotation marks and citations omitted). Here, the billing statement plaintiff provided merely includes an entry for an invoice from each doctor and the respective cost. Thus, "due to the lack of specificity of the billing," we are unable to determine from the record "whether the time alleged was attributable

to trial preparation, which would be taxable, or to purposes such as educating counsel, which is non-taxable." *Id.* at 219. "Remand is therefore necessary" in order to "distinguish [or] recalculate those hours spent on taxable versus nontaxable costs." *Id.*[9]

Thus, a remand also is warranted for the trial court to recalculate and make further factual findings regarding costs.

V. CONCLUSION

The trial court properly denied defendant's motion for a directed verdict on plaintiff's hostile work environment claim. However, further factual findings are needed relating to the trial court's order of attorney fees. The trial court also improperly accounted for some of the alleged costs, and included costs for expert fees without sufficient record evidence.

We affirm in part, reverse in part, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood

[9] While plaintiff provides an explanation of these fees on appeal, and even claims one doctor was not consulted for an expert fee, plaintiff failed to assert or prove that below.